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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE RIVERA IBARRA,

Defendant and Appellant.

E047039

(Super.Ct.No. SWF025418)

OPINION

APPEAL from the Superior Court of Riverside County. Michael S. Hider (Retired Judge of the Merced Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.), and Mark A. Mandio, Judges.* Affirmed.

Sachi Wilson, under appointment by the Court of Appeal, for Defendant and Appellant.

* Judge Hider denied defendant's motion to suppress evidence, Judge Mandio presided over sentencing.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Following the denial of his motion to suppress evidence under Penal Code section 1538.5,¹ defendant Jose Rivera Ibarra² entered a guilty plea to transportation of marijuana for sale (Health & Saf. Code, § 11360, subd. (a) (count 1)), and possession of marijuana for sale (Health and Saf. Code, § 11359 (count 2)). On Fourth Amendment grounds, he now challenges the denial of his motion to suppress evidence.³

FACTUAL AND PROCEDURAL BACKGROUND

At a hearing on defendant's motion to suppress evidence, a deputy assigned to the special investigations drug interdiction team testified he was on duty in a marked patrol unit on April 25, 2008, in the area of Interstate 15 because it had been shown to be a major route for transporting illegal controlled substances. About 1:50 p.m., he observed a vehicle changing lanes for no apparent reason without signaling and then abruptly slow down. As a result, the deputy initiated a traffic stop of this vehicle.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² Appellant's first, middle and last names are transposed in the record. The plea agreement, wherein defendant apparently printed his name, lists defendant's name as "Jose Rivera Ibarra."

³ In his opening brief, defendant also argued the trial court should have stayed the sentence imposed as a result of count 2 pursuant to section 654. However, defendant withdrew the argument in his reply brief, so we will not address it.

The deputy identified defendant as the driver of the vehicle. When the deputy approached the vehicle to ask for defendant's driver's license, the windows were rolled down and he detected an overwhelming smell of air freshener. Based on his training and experience, the deputy said strong odors like this were often used to mask the smell of drugs concealed in a vehicle. The deputy also testified defendant appeared "extremely nervous" when he reached over to hand the deputy his license and registration. The deputy confirmed the validity of these documents.

Based on the level of nervousness he observed and the strong odor emanating from the vehicle, the deputy asked defendant to exit the vehicle so he could speak with him face-to-face and so he could hear defendant better. The deputy explained the reason for the stop and asked defendant if he had any mechanical problems with his vehicle, but defendant said, "No." As they continued their dialogue, defendant handed the deputy his visa, even though the deputy did not ask for it, and said he was a citizen. The deputy called border patrol to verify the visa and had to wait a few minutes for a response. During this brief conversation, which lasted no longer than two minutes, defendant continued to appear very nervous.

The deputy asked defendant whether he had anything illegal in the vehicle, such as guns or illegal drugs. Defendant said, "No, no. Nothing." The deputy then said, "Well do you mind if I check your car? May I search your car for guns and drugs?" Defendant responded, "Yeah, sí," and nodded his head and pointed towards the vehicle. The deputy had defendant sit without handcuffs in the rear of his patrol vehicle for safety reasons and then brought out his dog, who was specially trained in narcotics detection, from a

separate compartment, to conduct an exterior sniff of defendant's vehicle. The dog indicated there was something inside the vehicle, so the deputy let the dog in through the side passenger door. The dog then alerted on a specific area in the rear of the vehicle to indicate the presence of a controlled substance. According to the deputy, three to four minutes passed from the time the deputy put defendant in the back seat until the dog alerted inside the car.

The deputy called for assistance, so he could further search the vehicle. Underneath a blanket inside the rear cargo area, the deputy found a laundry basket with a garbage bag inside. The bag contained 62.5 pounds of marijuana. The deputy found the drugs before he received a call back about the validity of defendant's visa. The deputy was able to determine defendant's driver's license and visa were valid, and his car registration was current. No citation was issued to defendant as a result of the stop.

The court denied defendant's motion to suppress the evidence found during the search of defendant's vehicle, stating as follows: "The Court is satisfied that there certainly was probable cause for the traffic stop, and once the traffic stop had been performed, there were additional factors that reasonably led the officer to believe that there may have been controlled substances in the vehicle, and that the warrantless search was proper under the totality of the circumstances. . . ."

On September 30, 2008, defendant pled guilty to both counts in exchange for the trial court's indicated sentence of two years in state prison. Immediately thereafter, the court imposed the two-year agreed sentence. To reach the total term, the court imposed two years on each count to be served concurrently to one another.

DISCUSSION

Defendant does not dispute the reasonableness of the initial traffic stop. Instead, defendant contends the deputy unreasonably prolonged the initial traffic stop and detention beyond the time necessary to carry out the purpose of the stop. In defendant's view, the traffic stop became unduly prolonged when the deputy asked him questions unrelated to the purpose of the stop without reasonable suspicion he was engaged in criminal activity. As a result, he argues the trial court should have granted his motion to suppress the evidence obtained during the search of his vehicle.

In reviewing a denial of a motion to suppress, we defer to the trial court's factual findings where they are supported by substantial evidence and, based on these factual findings, we exercise our independent judgment to determine whether the search was reasonable under Fourth Amendment standards. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) To determine whether evidence must be excluded because of a Fourth Amendment violation, "we look exclusively to whether its suppression is required by the United States Constitution." (*Glaser*, at p. 362.) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

A motorist may be stopped by a law enforcement officer based on objectively reasonable suspicion of a violation of the Vehicle Code or some other law. (*Whren v. United States* (1996) 517 U.S. 806, 810.) Having legally stopped defendant, the deputy

was entitled to detain him for the period of time necessary to discharge his duties related to the traffic stop. (*People v. Brown* (1998) 62 Cal.App.4th 493, 496-497.) Law enforcement officers may not impose “a general crime investigation upon the detained traffic offender that is not ‘reasonably necessary’ to completion of the officer’s traffic citation duties unless the officer has an independent reasonable suspicion that the driver has committed unrelated offenses.” (*People v. Williams* (1985) 168 Cal.App.3d 349, 358.) An officer may ask questions that are not directly related to the purpose of the traffic stop as long as relevant time parameters are not exceeded. (*People v. Gallardo* (2005) 130 Cal.App.4th 234, 239.) A detention may be prolonged if the officer discovers something suspicious during the course of the traffic stop. (*People v. Valencia* (1993) 20 Cal.App.4th 906, 918-919 [Fourth Dist., Div. Two].) In other words, facts that come to light during an investigatory detention may provide reasonable suspicion to prolong a detention. (*People v. Warren* (1984) 152 Cal.App.3d 991, 995-997.)

“In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. [Citations.]” (*United States v. Sharpe* (1985) 470 U.S. 675, 686.) “[T]he circumstances of each traffic detention are unique.” (*People v. Williams, supra*, 168 Cal.App.3d at p. 358.) As a result, “each detention period must be judged on its particular circumstances.” (*Ibid.*)

To support his argument, defendant relies heavily on *People v. McGaughran* (1979) 25 Cal.3d 577, which is the leading case in California on unlawfully prolonged

detentions during traffic stops. The officer in *McGaughran* stopped a car after he saw it driving in the wrong direction. He explained the reason for the stop and examined the licenses of the driver and passenger, who explained they were lost. (*Id.* at p. 581.) The officer admitted the traffic pattern in that area was confusing, and he had seen other drivers make the same mistake. His usual practice under these circumstances was to give the motorist the benefit of the doubt and let them off with a warning about the unusual traffic pattern. (*Id.* at p. 585.) This time, however, he returned to his patrol vehicle after his three- to four-minute discussion with the driver and the passenger and initiated a radio check for outstanding warrants in both names. (*Id.* at p. 581.) The dispatcher notified the officer of outstanding warrants about 10 minutes later. (*Ibid.*) Our Supreme Court held this “additional period of detention for the purpose of seeking out unrelated arrest warrants . . . was not ‘reasonably necessary’ ” to deal with the initial offense of violating the one-way traffic pattern, and it therefore “ ‘exceeded constitutional limitations.’ ” (*Id.* at p. 587.)

The facts of this case are easily distinguished from those at issue in *McGaughran*. Unlike the officer in *McGaughran*, the deputy in this case was confronted with highly suspicious circumstances during the first few moments of the traffic stop, and as a result, he was entitled to prolong the detention for a reasonable time to diligently confirm or dispel his suspicions. When he approached the open window of the vehicle, he detected “an overwhelming smell” of a “sweet vanilla air freshener.” Based on his training and experience, the deputy knew strong odors like that were often used to mask the smell of drugs concealed in a vehicle. Defendant also appeared “extremely nervous” in

comparison to most individuals just being stopped for a regular traffic violation.

Defendant avoided eye contact and his hand was visibly shaking while he reached over to the passenger side of the vehicle to hand the deputy his license. The deputy's opinion about the unusual level of nervousness was made based on thousands of traffic stops he had been involved in during his 10 1/2 years with the sheriff's department.

Prior to the stop, the deputy also observed defendant's vehicle change lanes for no apparent reason without signaling and then abruptly slow down on a steep downhill grade to about 45 miles an hour, which is 25 miles an hour below the posted speed limit of 70 miles an hour. Based on his training and experience, the deputy testified it was not unusual for people to drive in this manner to try to blend into traffic when they realize a marked patrol unit was approaching them and they were nervous because they had been speeding or doing something illegal.

Defendant contends nervous behavior is not a reasonable basis for extending a detention, because nervousness could understandably result from police questioning about a mere traffic violation. He also argues the strong odor of air freshener did not give rise to a particularized suspicion of wrongdoing, because air fresheners have a legal purpose. However, it was not these factors standing alone that caused the deputy to become suspicious. Rather, it was the combination of factors—the manner in which defendant was seen driving his vehicle prior to the stop, the unusually high level of nervousness defendant displayed from the early moments of the stop, as well as the “overwhelming” odor of air freshener. Based on the totality of these circumstances, it was in our view reasonable for a deputy with his training and experience to become

suspicious that defendant was involved in narcotics trafficking, and to continue to detain defendant in order to confirm or dispel his suspicions. For this reason, the deputy asked defendant to exit the vehicle, so he could speak with him face-to-face and so he could hear defendant better.

Next, the deputy attempted to put defendant at ease by explaining the reason for the stop and by asking defendant if he had any mechanical problems with his vehicle, but defendant said, “No.” When the deputy asked where he was going, defendant indicated he was supposed to meet a friend at a gas station. As they continued their dialogue, defendant handed the deputy his visa, even though the deputy had not asked for it, and said he was a citizen. The deputy called border patrol to verify the visa and had to wait for a response. During this brief conversation, which lasted no longer than two minutes, defendant continued to appear very nervous, and the deputy was unable to confirm or dispel his suspicions. As a result, the deputy asked defendant whether he had anything illegal in the vehicle, such as guns or illegal drugs. Defendant said, “No, no. Nothing.” The deputy then said, “Well do you mind if I check your car? May I search your car for guns and drugs?” Defendant consented to a search by responding, “Yeah, sí,” nodding his head, and pointing towards the vehicle.

As a reasonable means of confirming or dispelling his suspicions, the deputy had his specially trained dog sniff the exterior of the vehicle. However, this was not enough, because “the dog gave an indication that there were items in the car.” It then became necessary to further prolong the detention so the dog could sniff the interior of the vehicle, and so the deputy could examine the rear cargo area where the dog indicated

illegal drugs were located. The entire detention was a brief one, and the deputy acted quickly and diligently. The total time involved appears to have been about 10 minutes in all.

In sum, based on our independent judgment, we conclude the trial court properly denied defendant's motion to suppress evidence obtained as a result of the search of defendant's vehicle. The deputy's reasonable suspicion justified prolonging the detention up to and including the time of the search, and defendant validly consented to the search.

Defendant also contends his consent to the search of his vehicle was invalid because it was obtained as a result of an unconstitutional detention. "Consent to a search is a recognized exception to the Fourth Amendment's warrant requirement. [Citation.]" (*People v. Cantor* (2007) 149 Cal.App.4th 961, 965.) Where the state attempts to justify a search based on a defendant's consent, it has the burden of showing "consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances. . . ." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 248-249.) "Consent that is the product of an illegal detention is not voluntary and is ineffective to justify a search or seizure. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 341.) Because we have determined the detention met constitutional standards and there is nothing to indicate the search was otherwise involuntary, we reject defendant's contention he did not validly consent to the search of his vehicle.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

GAUT
J.

KING
J.